

## Exhibit B

**IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE  
AT NASHVILLE**

SMILEDIRECTCLUB, INC.,	)	
SDC FINANCIAL, LLC, and	)	
SMILEDIRECTCLUB, LLC,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 20-C-1054
	)	Judge Brothers
NBCUNIVERSAL MEDIA, LLC, and	)	
VICKY NGUYEN,	)	
	)	
Defendants.	)	

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**MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION TO STRIKE PLAINTIFFS' COMPLAINT UNDER  
TENNESSEE'S PUBLIC PARTICIPATION ACT**

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Dated: July 17, 2020

Respectfully Submitted,

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## INTRODUCTION<sup>1</sup>

In 2019, the Tennessee Legislature recognized a growing problem of businesses seeking to stifle public criticism through lawsuits attacking the exercise of free speech rights by consumers, reviewers, and news media. Such lawsuits chill critical commentary by imposing massive litigation costs on the speaker, even when they fail on the merits.

In response to this problem, the Tennessee Legislature last year joined a rapidly-expanding majority of states that have enacted laws designed to protect free speech by punishing and deterring “Strategic Litigation Against Public Participation” or “SLAPP suits.” Like other states’ “Anti-SLAPP” statutes, Tennessee’s law creates a mechanism for courts to dismiss speech-chilling lawsuits at the threshold, before the costly discovery associated with normal civil litigation. That mechanism requires the plaintiff to identify *at the outset* facts establishing a prima facie case for recovery, rather than resting on a complaint’s conclusory allegations and using discovery to fish for factual support. And it permits the defendant to provide its basic factual defense, so the court can evaluate whether further proceedings are genuinely likely to result in liability. Unless the plaintiff in this threshold proceeding can show that it already possesses facts sufficient to support each element of his claims, the Anti-SLAPP statute mandates dismissal of the complaint and an award of costs and reasonable attorneys’ fees to the defendant.

This case exemplifies the kind of lawsuit the Anti-SLAPP statute was enacted to address. Plaintiff Smile Direct fancies itself a “disrupter”—a company aggressively seeking to overturn

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<sup>1</sup> This Memorandum refers to the plaintiffs as “Smile Direct” and the defendants NBCUniversal Media, LLC and Vicky Nguyen together as “NBCUniversal.” NBCUniversal’s on-air and online news reports at issue, along with related posts on Twitter, are referred to collectively as the “Reports,” except where distinction between them is appropriate. Unless otherwise noted, all emphasis is added and all internal quotation marks and citations are omitted. Documents cited in this petition that are not easily accessible online are attached as exhibits.

what it considers to be a staid, decades-old consensus among incumbent orthodontic practitioners about how best to deliver orthodontic care. Smile Direct has spent millions of dollars promoting its self-styled innovative methods, openly inviting the public to pay close attention to its novel business practices. But Smile Direct bristles at anything other than applause for its efforts to unsettle the status quo. When the attention Smile Direct craves shades into criticism, public discussion suddenly becomes anathema—dissatisfied customers become liars, respected academics become biased hacks, professional journalists become deceitful advocates for an entrenched orthodoxy—and litigation becomes its weapon of choice.

This lawsuit is the latest example. Smile Direct’s complaint attacks news reports concerning widespread consumer complaints about its orthodontic practices—a classic exercise of protected free speech and free press rights. NBCUniversal’s Reports accurately described the existence of consumer complaints, including the accounts of two specific, named patients. The Reports corroborated the complaints by accurately quoting the opinions of a respected academic concerning orthodontic care, accurately recounting official government inquiries into and regulation of orthodontic practices, and accurately publishing hidden camera footage undermining the company’s claims about its patient-care policies. And the Reports even afforded Smile Direct itself on-air time to respond to the consumer concerns and explain the hidden camera footage.

Smile Direct cannot show that any statement in the Reports is false in any material respect. Nor can Smile Direct show—as it must—that NBCUniversal published any statement with “actual malice,” *i.e.*, *knowing* it was false, or *actually harboring serious doubts* about its truth. The record shows the opposite: NBCUniversal believed its Reports were entirely accurate.

Accordingly, even if Smile Direct could identify error in some statement, it still could not establish a constitutionally valid basis for liability.

Because the Reports are, in short, “a standard piece of investigative journalism that presents newsworthy allegations made by others, with appropriate qualifying language,” *Croce v. N.Y. Times Co.*, 930 F.3d 787, 793 (6th Cir. 2019), they are protected by the First Amendment and the Tennessee Constitution. Smile Direct’s complaint should be dismissed under Tennessee’s Anti-SLAPP law, and NBCUniversal should be awarded costs and reasonable attorneys’ fees for defending the action.

### **BACKGROUND**

#### **A. Smile Direct Faces Extensive Public Criticism**

Founded in 2014, Smile Direct is an oral care company that aims to treat patients whose teeth are misaligned without requiring them to visit orthodontic offices in person. Compl. ¶¶ 22, 35, 52. The patient provides information to Smile Direct, which Smile Direct in turn provides to its affiliated orthodontists and dentists. *Id.* ¶¶ 7, 36. Those affiliated doctors assess whether the patient is a candidate for Smile Direct’s treatment protocol. *Id.* ¶ 51. That protocol is a series of clear aligners intended to move the patient’s teeth slowly. *Id.* ¶¶ 22, 36; *see also id.* ¶¶ 41–51 (describing process).

Long before NBCUniversal decided to investigate customer complaints about Smile Direct, Smile Direct experienced public criticism on various fronts. Smile Direct’s response has been consistent: suppress criticism by attacking speakers in court for exercising their free speech rights.

##### **1. Smile Direct Repeatedly Sues Those Critical Of Its Business**

In August 2017, the Michigan Dental Association published an article stating that “mail-ordered, self-administered impression kits and retainers . . . raise[] numerous legal and patient

safety concerns.” Compl. ¶ 21, *SmileDirectClub, LLC v. Mich. Dental Ass’n*, No. 1:17-cv-939 (W.D. Mich. Oct. 26, 2017). The article identified Smile Direct as one of the providers of such kits, and contended that Smile Direct failed to comply with Michigan law regulating the practice of dentistry. *Id.* ¶ 22. On October 26, 2017, Smile Direct sued the Michigan Dental Association, claiming the article was defamatory and anticompetitive (among other things). *Id.* ¶¶ 27, 29–40; First Amend. Compl. ¶¶ 56–122 (Dkt. No. 14), *Mich. Dental Ass’n*, No. 1:17-cv-939 (W.D. Mich. Dec. 22, 2017). After the Association asserted a variety of affirmative defenses and moved to dismiss the complaint, Smile Direct acceded and voluntarily dismissed its complaint. Notice of Voluntary Dismissal (Dkt. No. 35), *Mich. Dental Ass’n*, No. 1:17-cv-939 (W.D. Mich. July 2, 2018).

On October 23, 2017, Smile Direct sued an orthodontics practice that had been critical of Smile Direct in a video available on the practice’s website. Compl., *SmileDirectClub, LLC v. Diamond Braces*, No. 1:17-cv-8136 (S.D.N.Y. Oct. 23, 2017). The video asserted that Smile Direct’s products and services were “questionable and dangerous” and that customers could lose their teeth. *Id.* ¶ 38. Smile Direct sought to hold the orthodontists liable for defamation, trade libel, and violations of federal antitrust laws and New York unfair competition laws. *Id.* ¶¶ 51–108. The lawsuit ultimately settled out of court, and Smile Direct’s complaint was dismissed with prejudice. Order of Dismissal on Consent, *Diamond Braces*, No. 1:17-cv-8136 (S.D.N.Y. Feb. 12, 2018). Smile Direct has threatened to sue at least two dentists for similar critical commentary. Nidhi Subbaraman, *When Dentists Criticize This Online Braces Company, It Takes Them To Court*, BuzzFeed News (Nov. 14, 2017), <https://perma.cc/K4TF-6HUZ>.

On April 11, 2018, Smile Direct sued another media outlet, Lifehacker, after it published a story saying that Smile Direct was a “bad” option and its products were “cheap.” Compl. ¶¶ 5,

55, 56, *SmileDirectClub, LLC v. Gizmodo Media Grp., LLC*, No. 18-401-IV (Tenn. Ch. Ct., Davidson Cty. Apr. 11, 2018). Smile Direct asserted claims for defamation and trade libel, *id.* ¶¶ 88–110, but later voluntarily dismissed its complaint.<sup>2</sup>

Just recently, on June 30, 2020, Smile Direct sued the Delta Dental Plans Association and two state Delta dental plans in Illinois court.<sup>3</sup> The claims allege that the Delta Dental entities have denied their customers teledentistry benefits allowed under their policies by systematically refusing to cover clear aligner therapy as prescribed by Smile Direct-affiliated Affiliated Dentists using the SDC Teledentistry Platform. *Id.*

2. *Medical And Business Organizations Criticize Smile Direct And Members Of Congress Request An Official Investigation*

On March 15, 2017, the American Association of Orthodontics (“AAO”) issued a “consumer alert” on its website, “urging consumers to beware of” services like Smile Direct’s, which “could result in the permanent loss of teeth, which may result in expensive and lifelong dental problems.” Am. Ass’n of Orthodontists, *Consumer Alert, Questions to Consider When Researching Direct-To-Consumer Orthodontic Companies* (Mar. 15, 2017), <https://perma.cc/3UBC-V2S9>.<sup>4</sup> Later in 2017, the American Dental Association (“ADA”) adopted a resolution “strongly discourag[ing]” the public from using services like Smile Direct “because of the potential for harm to patients.” David Burger, *ADA Discourages DIY*

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<sup>2</sup> The Chancery Court docket reflects that Smile Direct voluntarily dismissed the case on April 17, 2018, and the Court dismissed the case on August 15, 2018.

<sup>3</sup> *SmileDirectClub, Smile Direct Club Holds Delta Dental Entities Accountable for Depriving Millions of its Insureds Affordable Dental Treatment*, GlobeNewsWire (June 30, 2020), <https://perma.cc/TVG5-3KR>.

<sup>4</sup> The Court may take judicial notice of the publication of this alert and the other news articles cited in this petition because the fact of their public is a matter of “public record.” *Athena of S.C., LLC v. Macri*, 2016 WL 5956984, at \*5 (Tenn. Ct. App. Oct. 14, 2016).



*Orthodontics Through Resolution*, ADANews (Nov. 10, 2017), <https://perma.cc/FV65-JFZS>.

And in July 2019, the AAO issued a press release warning the public about “serious concerns” with Smile Direct’s protocol. Am. Ass’n of Orthodontists, *American Association of Orthodontists Discusses Patient Health and Safety Information Regarding Direct-to-Consumer Orthodontics*, PR Newswire (July 2, 2019), <https://perma.cc/Z26A-TQWB>.

By 2019, the ADA and AAO and their affiliates had filed complaints about Smile Direct in at least 36 states. Compl. ¶ 61. In spring 2019, the ADA also filed a petition with the Food and Drug Administration (“FDA”), asking it to investigate whether Smile Direct’s sale and distribution of its aligners is consistent with applicable law. Letter from C. Michael Kendall, Sr. Assoc. Gen. Counsel, Am. Dental Ass’n, to Division of Dockets Mgmt., FDA (Apr. 25, 2019), Dkt. No. FDA-2019-P-2038.<sup>5</sup> That petition was dismissed on procedural grounds, but the FDA said it would “take [the] complaint[] seriously” and would “evaluate this matter to determine what follow-up action is appropriate.” Compl. Ex. 5A. Both organizations also submitted a petition to the Federal Trade Commission (“FTC”), asking it to initiate an enforcement action against Smile Direct for making false and misleading claims about its products and services to entice consumers to purchase them. Letter from C. Michael Kendall, Sr. Assoc. Gen. Counsel, Am. Dental Ass’n, to Andrew Smith, Director, Bureau of Consumer Protection, FTC (June 27, 2019), <https://perma.cc/A346-7TEG>. That petition appears to still be pending.

On January 6, 2020, Members of Congress who are trained as dentists and orthodontists also wrote to the FDA and FTC expressing concern about Smile Direct in light of the “more than 1,350 ‘Customer Complaints’ on the Better Business Bureau’s website for the company, as well

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<sup>5</sup> The Court may take judicial notice of this document because it is a “matter[] of public record” and because “the complaint incorporates [it] by reference.” *Athena of S.C.*, 2016 WL 5956984, at \*5; see Compl. Ex. 5A (discussing response to Kendall letter).

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